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ters; but, if admitted, is generally mere harmless error. Va. Iron Coal & Coke Co. *v.* Tomlinson's Adm'r, 104 Va. 249, 51 S. E. 362

[7] Errors are assigned to the action of the court in permitting witnesses Stanger and Lane to testify as stated in bills of exceptions numbered 5 and 7, respectively. The object of the evidence of these witnesses was to show the direction and velocity of the wind on the day of the fire. While Stanger testified to the direction of the wind at a later period in the day than the testimony tends to show that the fire crossed from the lands on the north side of the defendant's road to the lands on the south side, and Lane testified as to the direction and the great velocity of the wind on that day when he was some twenty or thirty miles distant, the evidence tends, we think, to sustain the plaintiffs' contention as to the direction and velocity of the wind, material facts in the case, at the time the injury occurred, and was therefore admissible for what it was worth.

The remaining assignment of error is to the refusal of the court to set aside the verdict in the case of Linkous, etc., because contrary to the evidence. As the judgment will have to be reversed and the verdict set aside for the errors hereinbefore pointed out, and the causes remanded for new trials to be had in which the evidence may be different, it will serve no good purpose to consider that assignment of error.

In each case the judgment must be reversed, the verdict in each set aside, and the causes remanded for a new trial to be had not in conflict with the views expressed in this opinion.

Reversed.

WHEALTON & WISHERD *v.* DOUGHTY.

Sept. 14, 1911.

[72 S. E. 112.]

1. Navigable Waters (§ 36*)—Tide Lands—Ownership—"Guts."—Under Code 1904, § 1339, providing that the limits of lands lying on the shores of the sea, and the rights and privileges of the owners thereof, shall extend to low-tide mark, but no farther, the limits of marsh lying below high tide, to which the owner of the shore land is entitled, do not stop with a "gut" or channel which runs from a bay up across the marsh, in a direction more or less parallel with the shore, if such channel ebbs dry at ordinary low-water mark, but the

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.

part of the marsh to which he is entitled extends across such channel to ordinary low tide.

[Ed. Note.—For other cases, see Navigable Waters, Dec. Dig. § 36.*]

2. Trial (§ 191*)—Instruction—Assumption of Facts.—An instruction that if the jury believe from the evidence that plaintiff was in actual possession of the land, and claimed title thereto by virtue of a certain deed of partition, and defendants entered and took possession of part of it within the 15 years next preceding commencement of the action, they shall find for plaintiff, does not assume adversary possession in plaintiff of the land claiming under the deed of partition.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 420-435; Dec. Dig. § 191.*]

3. Trial (§ 252*)—Instructions—Sufficiency of Evidence to Warrant.—To give an instruction, without evidence on which to base it, diverting the attention of the jury to the question of adversary possession of plaintiff under a claim of right, is error.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 505, 596-612; Dec. Dig. § 252.*]

4. Adverse Possession (§ 100*)—Limits of Possession.—While one's occupation of part of the land within the description of her deed gives her possession to all of it, it does not extend her possession to land outside its description, though claimed by her by virtue of the deed.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 547-574; Dec. Dig. § 100.*]

5. Adverse Possession (§ 16*)—Property Subject to Prescription—Wild Lands.—Wild and uncultivated lands can not be made the subject of adversary possession while they remain completely in a state of nature.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 82-89; Dec. Dig. § 16.*]

6. Adverse Possession (§ 16*)—Nature and Requisites.—Evidence merely that plaintiff's cattle had from time to time during many years roamed over the marsh in question below the shore of the sea, when not covered with water at high tide, just as they had roamed over other adjoining marsh lands, and that she had cut wild grass therefrom, and used it as dressing on her highlands, is insufficient to show adverse possession.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 82-89; Dec. Dig. § 16.*]

7. Evidence (§ 265*)—Admissions—Conclusiveness.—While the fact that defendant's grantor did not claim title to certain lands, but acknowledged he was not the owner of it, and disclaimed title to it,

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.

is evidence to be considered along with other evidence in determining who was the true owner, it does not estop defendant claiming under him to claim to the true boundaries.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1029-1050; Dec. Dig. § 265.*]

8. Navigable Waters (§ 36*)—Ownership of Tide Lands—Boundaries.—Where the division line between uplands on the shore of the sea owned by two persons is a straight line for some distance before it reaches high-water mark, such line, in the absence of a change by the parties, continues in the same course to low-water mark, as regards the tide marsh lands to which they are entitled.

[Ed. Note.—For other cases, see Navigable Waters, Cent. Dig. §§ 180-200; Dec. Dig. § 36.*]

Error to Circuit Court, Northampton County.

Action by Mrs. Willietta Doughty against J. H. Whealton and another, partners as Whealton & Wisherd. Judgment for plaintiff. Defendants bring error. Reversed.

Instructions C and D, given for plaintiff, and instructions 7, 8, and 10, asked by defendant and refused, are as follows:

Instruction C: "The court instructs the jury that if they believe from the evidence that Mrs. Willietta Doughty, by virtue of partition deed with James P. Fitchett, entered upon the land in controversy, improving and cultivating a part and claimed title to the whole, she was in actual possession of the whole land within the boundaries and what is the whole is to be determined by the limits owned or claimed."

Instruction D: "The court instructs the jury that if they believe from the evidence that Edward T. Nottingham, the grantor of Marion Scott, did not claim title to the land in question, but acknowledged the same to be in the owner of the land, at present owned by Mrs. Doughty, then they must find for the plaintiff, unless they further believe from the evidence that Marion Scott has been in open, notorious, and continuous possession thereof, claiming bona fide title thereto for more than 15 years prior to the institution of this suit."

Instruction 7: "The court instructs the jury that by statute the bounds of every man's land lying on the seaboard is extended to ordinary low-water mark, and that a drain or gut which goes bare at ordinary low water does not cut off or prevent the extension of such line, but the same is continued across and beyond such stream down to ordinary low-water mark."

Instruction 8: "The court instructs the jury that if they be-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.

lieve from the evidence that the division line between the upland of the plaintiff, Willietta Doughty, and those under whom she claims, and the uplands of the defendant and those under whom he claims, is a straight line for some distance before it reaches high-water mark, then the law continues such line in the same course to low-water mark, and, if the course of such line has been changed below high-water mark, the burden is upon the plaintiff to show it, but in deciding this question the jury should consider all the evidence heard in the case."

Instruction 10: "The court instructs the jury that the opinion or supposition or verbal declaration of E. T. Nottingham, through whom defendants claim, as to where his true lines were, cannot stop those claiming under him from claiming to the true boundaries, yet the jury may consider any such declaration as evidence to show what was the true boundary of the lands of the defendants."

Otho F. Mears and *Kendall & Daniel,* for plaintiffs in error.

Jno. E. Nottingham, Jr., and *Ben T. Gunter,* for defendant in error.

CARDWELL, J. Mrs. Willietta Doughty instituted this action of ejectment against J. H. Whealton and D. N. Wisherd, partners trading as Whealton & Wisherd, and lessees of Marion Scott, to recover the possession of certain marsh land described in the declaration. Upon the trial of the cause, there was a verdict and judgment in favor of the plaintiff for the 187½ acres of land sued for and $125 damages on account of its detention. To that judgment this writ of error was awarded.

It appears that Marion Scott and defendant in error are the owners of adjoining farms in Northampton county, facing to the east on what is commonly known and designated as the "Broadwater," which covers at high tide the marshes lying between the highland and the ocean, a distance of about eight miles; that under a lease from Scott, dated February 27, 1907, plaintiffs in error entered upon the marsh lying to the east of the highland belonging to their lessor for the purpose of planting and propagating oysters thereon; that through said marshes, of which the 187½ acres in dispute here is a part, more remote from the highland deep channels run, one of which is referred to in the old deeds in evidence as "the river running down the peninsula," or "the river running along the seaside," but near the highland a great number of drains, or as locally designated, "guts," run in irregular courses through the marshes; and that plaintiffs in error's lessor, Marion Scott, claims the disputed marsh as a part of his farm by reason of his riparian rights, while defendant in error asserts title to and possession

thereof, not only by reason of her riparian rights, but by adversary possession, for the statutory period, under a claim of right thereto.

Defendant in error claims title to her farm through a deed of partition made between her and her brother, James P. Fitchett, on August 27, 1891, the land partitioned being described as "containing by estimate two hundred and fifty acres (250 a.), be the same, however, more or less, and bounded on the north by the lands of the heirs of Thomas E. Brickhouse; on the east by the Atlantic Ocean; on the south by the lands of the heirs of Edward T. Nottingham, and on the west by the land of the heirs of John Walter Williams and James L. Nottingham, respectively." And Marion Scott is the owner of the land formerly owned by the heirs of Edward T. Nottingham referred to in said partition deed, his title thereto being undisputed in this case.

[1] The boundary line between the Scott farm and that of defendant in error, marked by trees and a ditch, runs from a county road in an easterly direction until it reaches the marsh land in dispute lying in front and to the east of the farm of Scott and south of what would be a prolongation of the boundary line between the highland of his farm and that of defendant in error; and the disputed marsh land is bounded on the north by said prolongated line, on the east by the Broadwater, on the south by Magothy Bay, and on the west by that part of Scott's farm conceded to be his. Along the east boundary of Scott's highland, separating it from the marsh, is a "gut" or channel which "heads up" from Magothy Bay to or beyond the point at which the line which separates the highland of Scott and that of defendant in error reaches the "gut," and along the line separating the highlands of the two farms there is a puncheon fence for a short distance extending to the water in the "gut," put there some years ago for the purpose, it is claimed, so to inclose the marsh land as to keep off the stock of the adjoining landowner, and to enable defendant in error to use and enjoy the marsh in question as a pasture for her own cattle. All of this marsh in dispute is covered with water at high tide and it is not claimed that defendant in error's highland extends to the north of it, nor is there in the partition deed mentioned, or any other deed or paper writing in evidence under which she claims, a description of boundaries by which the 187½ acres of disputed marsh could be located. If, therefore, the "gut" or channel mentioned, which "heads up" from Magothy Bay to or beyond the point at which the line dividing the highlands of Scott and the defendant in error, ebbs dry for an appreciable distance south of said division line, the marsh in dispute belongs to Scott by virtue of the statute of 1679, now section 1339, Code 1904, un-

less he and those under whom he claims have lost the right thereto by an adversary possession thereof for the statutory period of limitation. French *v.* Bankhead, 11 Grat. 160; Groner *v.* Foster, 94 Va. 650, 27 S. E. 493; Waverley, etc., Co. *v.* White, 97 Va. 176, 33 S. E. 534, 45 L. R. A. 227.

The giving by the trial court to the jury of instructions A, B, C, and D for defendant in error, and the refusal to give instructions 7, 8, 9, and 10, asked by plaintiffs in error, is assigned as error.

[2, 3] Instruction A is as follows: "The court instructs the jury that if they believe from the evidence that the plaintiff, Mrs. Willietta Doughty, was in actual possession of the land in controversy and claimed title thereto by virtue of deed of partition with James P. Fitchett, and the defendants in this action entered and took possession of any part of the said premises within 15 years next preceding the institution of this action, then they should find for the plaintiff, unless they should further find that the defendants are the true owners of said land or were authorized by the true owner to enter thereon, and the burden is on the defendants to prove by a clear preponderance of evidence that they are the owners or were authorized by the true owner to so enter."

[4] The instruction is not amenable to the objection that it assumes adversary possession of the disputed marsh in defendant in error claiming title thereto by virtue of her deed of partition with James P. Fitchett when plaintiffs in error entered and took possession of a part of the premises, but the instructions did erroneously divert the attention of the jury to the question of adversary possession in defendant in error under a claim of right without evidence upon which to base it. The possession of defendant in error of her highland by virtue of said partition deed could not thereby be extended so as to embrace the disputed marsh, since neither in this partition deed nor in any other paper or papers offered in evidence under which she claims is there a description of boundaries which embraces or includes the disputed marsh.

"Where the claimant of title relies upon a deed of conveyance, it is well settled, both by reason and authority, that, in order to be effective as evidence of title, it must either in terms or by reference to other designation give such description of the subject-matter intended to be conveyed as will be sufficient to identify the same with reasonable certainty." Warville on Ejectment, § 295.

The words, "what is the whole is to be determined by the limits owned or claimed," used in instruction C, would be unobjectionable in a proper case, as where a plaintiff or a defend-

ant in an ejectment proceeding was, upon reasonable grounds, contending that the land in controversy was within the description of boundaries given in his title papers, but to say that what is the whole of the demandant's land is to be determined by the limits claimed, though those limits are outside the boundaries described in his title papers or of his actual possession, finds no sanction either in reason or authority. These words quoted from instruction C were taken doubtless from the case of Taylor *v.* Burnsides, 1 Grat. 191, and sanctioned in many other cases where the evidence warranted it, but, as the opinion of the court in the case named shows, the possession of the apparent owner of land who holds under color of title, having possession of part, like that of the real owner, extends to the bounds of the lands embraced in his title papers, while the possession of the intruder can extend no farther than his actual occupancy.

[5] In this case it is conceded that "wild and uncultivated lands cannot be made the subject of adversary possession while they remain completely in a state of nature." A change in their condition, to some extent, is essential. City of Richmond *v.* Jones, 111 Va. 214, 68 S. E. 181; Harman *v.* Ratliff, 93 Va. 249, 24 S. E. 1023; Turpin *v.* Saunders, 32 Grat. 36.

In 1 Cyc. p. 990, it is said that, although there are some decisions apparently to the contrary, the weight of authority sustains the rule that the mere occasional cutting of timber on land is not alone such evidence of ownership as to amount to a possession adverse to the true owner, and "the additional circumstances that the claimant * * * pastured his hogs or cattle there occasionally, or did other similar acts, will not constitute actual possession;" and on page 992 it is said that the occasional or periodical entry upon land to cut wild grass is not an act manifesting a purpose to take possession as owner, and does not constitute actual possession. Among the decided cases cited in support of the text just quoted is the case of Lambert *v.* Stees, 47 Minn. 141, 49 N. W. 662, where it is held that the fact that a person cuts hay on uninclosed land, lets his cattle roam over and pasture upon it just as they pasture on adjacent uninclosed lands, and prevents people from cutting and stealing wood on the land is not sufficient to constitute adverse possession. See, also, Wheeler *v.* Winn, 53 Pa. 122, 91 Am. Dec. 186.

All the authorities agree that acts done upon land requisite to constitute adverse possession must be such as to indicate and serve as notice of an intention to appropriate the land itself, and not the mere products of it, to the dominion and ownership of the party entering, being acts of permanent improvement.

The case of Drake *v.* Curtis, 1 Cush. (Mass.) 395, is authority for the proposition that the ordinary presumptions and con-

clusion of law arising from possession and use can have no application in regard to open and uninclosed flats; that the constant use of such flats by one not entitled to claim or hold them as the riparian proprietor for the ordinary purposes of navigation can give no exclusive or adversary possession. In the opinion in that case by Shaw, C. J., it is said: "The rule is simple, but it is rendered complicated and difficult of application by the infinitely diversified forms which the seashore may present."

As we have seen, the marsh land in controversy in this case is not within the descriptive boundaries of defendant in error's title papers offered in evidence, and therefore, if she has title to the marsh, it must be by reason of her riparian rights under the statute law of the state, and not by reason of a prescriptive right by virtue of the statute of limitations.

In Austin *v.* Minor, 107 Va. 101, 57 S. E. 609, the property in dispute was a marsh, valuable only for hunting, fishing, and trapping, and to a limited extent as a range for hogs, one of the questions presented for decision being whether the property was capable of such enjoyment as accompanied by a claim or color of title would ultimately ripen into a good title; and the opinion by Keith, P., says that, if the tide ebbs and flows over this property, it is doubtful whether a title by adverse possession can be acquired to it, separate and distinct from the rights of the riparian owner. Roe *v.* Strong, 107 N. Y. 350, 14 N. E. 294.

[6] The evidence in this case as to adversary possession in the defendant in error of the disputed marsh is to the effect only that her cattle and those of her predecessors in title had from time to time during many years roamed over the marsh when not covered with water at high tide, just as they roamed over other marsh land adjoining, and that she and her predecessors in title had cut wild grass therefrom (how many times and at what intervals are not stated), and hauled it away for use as manure on the highland. This evidence did not call for or warrant the giving of instruction A with respect to the question of adversary possession, and therefore such an instruction had the tendency to divert the attention of, if not to mislead, the jury as to the true question for their consideration.

For the reasons already stated, instruction C, given for the defendant in error, was also erroneous, and should not have been given

[7] Instruction D in the form in which it was offered should have been refused. The fact that Edward T. Nottingham, the grantor of Marion Scott, did not claim title to the land in question, but in fact acknowledged that he was not the owner of it, and disclaimed title thereto, was competent evidence to be considered by the jury along with the other evidence in determining

who was the true owner, and was properly admitted for the consideration of the jury; and we think that instruction 10, asked for by the plaintiffs in error and refused by the court, should have been given, and that it sufficiently presents the law upon this aspect of the case. Sutherland *v.* Enswiller, 111 Va. 507, 69 S. E. 363.

[8] The crucial question in the case is whether or not the "gut," drain, or channel which "heads up" from Magothy Bay to or beyond the line which divides the highlands of defendant in error and plaintiffs in error's lessor ebbs dry at ordinary low water for an appreciable distance from said line, and, if the jury's finding from the evidence be that said "gut," drain, or channel does so ebb dry, the law of the case is as propounded in plaintiffs in error's instructions 7 and 8, which were erroneously refused. Groner *v.* Foster, supra; Waverley, etc., Co. *v.* White, supra.

As the judgment of the circuit court has to be reversed, the verdict of the jury set aside, the cause remanded for a new trial to be had not in conflict with the views expressed in this opinion, we deem it unnecessary to consider the other questions presented in the petition for this writ of error.

Reversed.

Note.

In reading this case we are forcibly reminded of the case of City of Richmond *v.* Jones, 111 Va. 214, 68 S. E. 181, also reported with annotation in 16 Va. Law Reg. 272. That case is cited in the opinion here to the point that there can be no adverse possession of wild and uncultivated lands while they remain completely in a state of nature, but more interesting is its bearing upon the question of the burden of proof in ejectment. Upon this question we ventured to differ from the ruling in that case, and set forth our reasons and authority therefor at some length in the note above referred to, and upon a reperusal thereof we see no reason to recede therefrom. Indeed we have since accidentally come across other cases supporting the same.

But the court in the principal case, without referring to its previous ruling upon a very similar point in the Jones case, here lays down a proposition of law broad enough to cover the very point for which we contended in the Jones case.

Speaking by Judge Cardwell it says, holding erroneous an instruction which told the jury that if they believed that plaintiff, by virtue of a partition deed, entered upon the land in controversy, improving and cultivating a part and claimed title to the whole, she was in actual possession of the whole land within her boundaries and *what is the whole is to be determined by the limits owned or claimed,* as follows: "The words 'what is the whole is to be construed by the limits owned or claimed,' so used, would be unobjectionable in a proper case, as where a plaintiff *or a defendant* in an ejectment proceeding was, upon reasonable grounds, contending that the land in controversy was within the description of boundaries given in

his title papers, *but to say that what is the whole of defendant's land is to be determined by the limits claimed, though these limits are outside of the boundaries described in his title papers* or of his actual possession, finds no sanction either in reason or authority." The court cites the same section of Warville on Ejectment to this proposition that we cited in the note referred to.

The point contended for in this note to the case of City of Richmond *v.* Jones, was, that where a plaintiff in ejectment shows himself to have been in possession of the premises demanded, or of a part thereof, and that he was ousted from this possession by the defendant, then he is entitled to recover such premises, *unless the defendant show a better title thereto.* And also, that, if defendant sets up a patent superior to plaintiff's paper title, it must appear on its face or be shown to embrace the premises in controversy, and that an instruction which told the jury that unless such patent on its face embraced, or was shown by a preponderance of evidence to embrace, the premises, the plaintiff should recover, was correct.

It seems to us that the principle approved in the principal case, that when a claimant of title (which we take to mean either the plaintiff or defendant in ejectment) relies upon a deed of conveyance, in order to be effective as evidence of title it must either in terms or by reference to other designation give such description of the subject matter intended to be conveyed as will be sufficient to identify the same with reasonable certainty, means, in other words, that he must show affirmatively that the paper title he sets up covers the land in controversy.

Two Texas cases so holding, in addition to the authorities cited in the note above referred to, are as follows: Caplen *v.* Drew, 54 Tex. 493; Duren *v.* Strong, 53 Tex. 379. In the former it was said, as to the burden of proof in ejectment: "What constitutes a sufficient title to make a prima facie case against a defendant in possession, is discussed and clearly stated by the present chief justice in the case of Keys *v.* Mason, 44 Tex. 142, 143, wherein it in effect is said, that merely a prior possession to that under which the defendant claims, with a regular claim of title, connecting himself with such prior possession, would overcome the presumption of right arising from the defendant's possession, and throw upon him the burthen of disproving the plaintiff's case, or showing a superior title in himself." Caplen *v.* Drew, 54 Tex. 493, 496; and in the latter: "The effort of defendants to show color of title in themselves failed, by reason of the failure to identify the land conveyed in the title bond from Thomas Morrow to J. R. Melton with the land in controversy. The plaintiff having clearly established a prior peaceable possession never abandoned, and the defendants having failed to show any right to disturb that possession, the judgment in favor of plaintiff should stand." Duren *v.* Strong, 53 Tex. 379, 381.

J. F. M.